Via Email Transmission: reg.review@nigc.gov

August 10, 2012

Tracie Stevens, Chairwoman
National Indian Gaming Commission
1441 L Street, N.W., Suite 9100
Washington, DC 20005

Dear Chairwoman Stevens,

These comments to the Proposed Rule for both 25 CFR 547 and 543 are submitted on behalf of the Oklahoma Tribal Gaming Regulators Association (OTGRA), a non-profit 501(c)(6)Association comprised of 29 Tribal Gaming Commissions for gaming tribes within the State of Oklahoma.

The OTGRA would like to express its appreciation for allowing the tribes significant opportunity to provide input during the review process through consultation, written comment, and through the Tribal Advisory Committee (TAC) work. As you are aware, three of our OTGRA members were selected to serve on the TAC (Matt Morgan, Robin Lash, and Mia Tahdooahnippah). Our Association is very proud of the hard work of the TAC and is pleased that so many of the recommendations of the TAC concerning Part 547 have been incorporated into the regulation.

As you are aware, Class II gaming systems are very important to Oklahoma gaming tribes. As a result, this important regulatory review process of both the MICS and the Technical Standards has been closely monitored by the Association and its member tribes. This Association has reviewed the Proposed Rules for Part 547 and Part 543 and respectfully submit its comments as follows:

Part 547 – Class II Technical Standards for Gaming Equipment

In addition to the positive changes already made to date in Part 547, the OTGRA is very pleased with the following additional changes to in the Proposed Rule:

- 547.2 Definitions. Removal of *Proprietary Class II System Component* as the word was not used elsewhere in Part 547 and led to confusion.

- 547.3(a) Minimum Standards. Removing the language that TGRA's "also regulate Class II gaming" which appeared as inconsistent with IGRA and NIGC statements. IGRA at §2710(5) specifically states that "Indian Tribes have the *exclusive right to regulate* gaming activity on Indian lands...." The Commission powers to "monitor", and "inspect and examine" as provided in IGRA §2706 (b)(1)-(2) are far more limited.

- 547.16(c) Odds Notification. Removing the requirement that a Class II game "continually" display the odds of achieving a top prize as potentially placing Class II games at a disadvantage with other Class III games not requiring such notice.

- 547.17 Alternate Standards. Replacing the term "variance" with "alternate standard" which more accurately describes the activity described. However, as primary regulators of Class II gaming, the OTGRA support further modification to allow the TGRA to grant the variance and notify the NIGC with information to support the TGRA approval and invite comment. The current Proposed Rule requires that the NIGC approve an alternate standard granted by a TGRA.

Though the OTGRA applauds the positive changes made to Part 547 through this review process, there remain areas of serious concern which the OTGRA note as follows:

- 547.5 Grandfather Clause. In general, the OTGRA opposes maintaining the sunset provision in the grandfather clause due to the serious negative financial impact this regulation creates. The OTGRA strongly urges the Commission to modify the sunset provision to allow these valid, legal Class II systems to remain in play indefinitely.

  In March and April 2012, many tribal gaming organizations submitted resolutions which supported the recommendations of the TAC, which included eliminating the sunset clause. The OTGRA resolution represented the 29 OTGRA member tribes, National Indian Gaming Association (NIGA) resolution represented NIGA's 184 member tribes, the OIGA resolution represented the 27 member tribes, and the Arizona Indian Gaming Association resolution represented the (member tribes. Through these important and unanimous resolutions, Indian Country clearly let the Commission know the desire by the tribes to have the unfair grandfather clause modified, specifically to remove the sunset clause to allow the continuation of play of legal, Class II grandfathered games.

  In support of this position, discussed at length in the OTGRA resolution, the OTGRA now reiterates that these grandfathered games are valid, legal games, which have never presented, nor do they now present a risk of any kind to either the tribes or the patrons. Rather, these legal Class II systems are highly successful and lucrative gaming systems that sovereign tribal governments should have the right to provide to patrons if they choose to do so. In addition, the unilateral decision by the NIGC to limit and ultimately eliminate these legal games is completely inconsistent with the manner in which federal agencies

address manufactured products in a rule making process. In essence, the grandfather sunset clause represents an industry-wide recall of a type of product which has posed no threat, and does not now pose a threat to the public.

Of specific concern in the grandfather clause is the language presented in Part 547.5 of the Proposed Rule. The language, as written, appears to invalidate previously tested and certified legal Class II grandfathered systems as non-compliant which would result in a requirement for recertification. This issue occurs in Part 547.5 (a) and (b) which requires testing and compliance with standards in Part 547.14. Changes in Part 547.14 in the Proposed Rule now establish mandatory testing of standards that previously were optional. For example, if a game in 2008 was not tested to all the required elements listed in 547.14, the certification of that game will no longer be valid per the deleted 2008 language in the Proposed Rule at 547.14(b)(2). The result is additional costly recertification tests for these grandfathered games.

In previous consultations and written comments Oklahoma gaming tribes have represented that the tribes will suffer financial hardship should the existing Part 547.5 section remain unchanged. In support of these statements, the OTGRA, in conjunction with the Oklahoma Indian Gaming Association (OIGA), conducted a poll of OTGRA member tribes to provide the Commission with legitimate statistics concerning legal Class II grandfathered systems currently in place. Twenty out of 29 OTGRA member tribes voluntarily submitted highly confidential, proprietary information to assist this Association and the OIGA in providing the NIGC with the information requested. Because of the proprietary nature of this information, responses are presented in summary form.

Legal Class II Grandfather (GF) Systems Poll Summary

Number of Tribes Who Participated:	**20**
Number of Legal Class II GF Boxes Reported:	**18,476**
Number of Legal Class II GF Boxes Owned by Tribes:	**6,988 (3 tribes)**
Value of Legal GF Class II Boxes Owned by Tribes:	**$46,170,000.00**
Number of Tribes with *Compliant Class II* Boxes:	**3**
Number of Reported *Compliant Class II* Boxes:	**3,872**
Percent of Floor Made up of Legal Class II GF Boxes:	**38.2%, 10%, 100%, 100%, 32%, 26%, 34%, 35%** (12 tribes did not provide this information)
Revenues from Legal Class II GF Boxes Per Day:	**$173, $135, $280, $141, $366, $92, $129, $100, $55, $92, $194, $73** (8 tribes did not provide projected lost revenue.)
Projected Down Time (upgrade/removal):	**30 days** (9 tribes) **45 days** (1 tribe) **7 days** (2 tribes) **8 hours** (1 tribe) **No Comment** (7 tribes)
Total Projected Lost Revenues – (Downtime for Removal/ Replacement of Leased Legal GF Systems and Loss of Legal, Tribally-Owned GF Boxes):	**$65,566,836.00**

The tribes submitted comments on a myriad of very serious concerns associated with financial hardship and loss of gaming revenues in connection with loss of use of legal Class II gaming systems. These concerns result, at a minimum, from the following:

1. **Down time to upgrade or replace grandfathered systems. Many tribes believe they will experience significant downtime totaling 30 days or more with associated lost revenues per box per day.**

2. **Industry delay in providing replacement equipment.**

3. **Industry costs of upgrade/replacement passed on to the tribes.**

4. **The staggering loss of revenue for GF equipment owned by tribes (see above).**

5. **The high cost to purchase complaint replacement boxes. New box costs are estimated at $11,000 to $15,000 per box.**

6. **The loss of play from replacement games which patrons do not like. This potentially high number cannot be estimated at this time.**

Please keep in mind that nine OTGRA member tribes did not participate in this poll, and four additional tribes (Oklahoma has 33 gaming tribes) were not polled as they are not members of this Association. **Please Note: Some of Oklahoma's largest gaming tribes did not participate in this poll and are not represented in the information provided above.** The above numbers would likely triple had that information been submitted.

It is clear that removal of the legal grandfathered systems will cause an immense, adverse financial impact for the tribes that rely on legal Class II systems, and rely on those revenues. The OTGRA strongly urges the NIGC to remove the sunset provision and allow these safe, lucrative, legal Class II systems, that impose no threat of any kind in this industry, to remain in play for the benefit of the tribes and their members. The Association also urges the Commission to review the Propose Rule language in 547.5, and clarify the language to eliminate possible confusion of legal grandfathered system testing requirements in section 547.14.

- 547.14 Scaling Algorithm. The revisions in this section are also a concern to this Association. Specifically, the concern stems from the fact that 547.14(b)(2)(i) was not a requirement in 2008 when the grandfather provision was put in place. Existing language in 547(b)(2) " which may include," provides that the nine tests listed in the section are optional. The Propose Rule now makes three of the nine tests mandatory. Because this section is referenced in both 547.5 (a) and (b), the result of this language will now be required recertification of previously certified legal Class II grandfathered systems.

  To eliminate this problem, the OTGRA respectfully suggests the language of 547.14 remain as written in the existing regulations. Additionally, the OTGRA suggests clarification language in the Proposed Rule to clarify that "nothing in the regulation is intended to prohibit the continued use of any Class II game, component, or system that was previously certified against the grandfather provisions or any judicial ruling."

- 547.16 (b) Disclaimers. Requiring continual display of disclaimer is burdensome and unfeasible in smaller devices such as hand held devices. A suggested option is to include alternative language should be considered to require the disclaimer to be displayed only until acknowledged by the player.

The OTGRA is concerned with the Commission's comments in the Proposed Rule concerning modification of existing legal Class II systems. The Commission inquires as to whether a repair or replacement should trigger a requirement for the game to be made fully compliant with the new technical standards? The OTGRA strongly opposes the proposition that an affordable repair or replacement of a legal grandfather system would trigger an expensive upgrade to a fully compliant system. It clearly is unfair to require formerly certified systems to be compliant with standards that were not in existence when the system was manufactured.

Part 543- Minimum Internal Control Standards

The focus of the Association has been on Part 547 Technical Standards and, specifically, the grandfather clause issues. The OTGRA, therefore, is not providing comment on Part 543 and would instead direct your attention to the comments submitted by the Tribal Gaming Working Group, who have diligently labored over the past couple of months to address concerns with the MICS revisions, to include the Part 543 Proposed Rule.

In summary, the OTGRA again extends the Association's appreciation for this opportunity to comment on the very real and very important topics discussed in this comment. The Association strongly supports the sovereignty of tribes to determine what games to place on their floors. The unilateral decision of the past Commission to invalidate valid, legal, safe and lucrative, legal Class II systems based on an arbitrary date, with no rational basis for the decision, is of serious concern to this Association. The Proposed Rule for Part 547, as written, maintains this unfair regulation, with new additional concerns. The Commission was pointedly asked at the Norman, Oklahoma consultation on June 11, 2012, why the Commission would maintained the sunset clause in discussion draft of the regulations. The response from the Commission was that the Commission must "protect against risks." This Association and its member tribes strongly and emphatically state that there are no risks with these legal, Class II systems. There has been no documented risk during the course of the 15 plus years that these games have been in play, and the tribes, who rely on revenues from these systems, assert that there are no risks. The OTGRA thus urges the Commission to revisit the noted areas of concern with language in section 547.5 and 547.14, and to remove the sunset clause in 547.5(b)(1).

Best regards,

Brett Barnes Robin Lash Traci L. Atkinson